REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISCELLANEOUS CRIMINAL APPLICATION NO. 63 OF 2018

PETER KINYANJUI GICHIA.....APPLICANT

VERSUS

D.P.P.....1ST RESPONDENT

ANN WAMBUI NGUGI.....2ND RESPONDENT

R U L I N G

1. The background to the application filed on 25th July 2018 is as follows. The Applicant, **Peter Kinyanjui Gichia** (the Applicant) is the complainant in **Thika Cr. Case No.5901/17** in which an advocate, **Ann Wambui Ngugi** is charged with assault contrary to Section 251 of the Penal Code. The particulars state that on 6th November 2017 at Thika town, she unlawfully assaulted **Peter Kinyanjui Gichia** and occasioned him multiple bodily injuries. She denied the charges.

2. The hearing commenced before **Kyanya Nyamori, RM,** on 14th May 2018. The complainant commenced his evidence in chief but the same was interrupted and not completed. The record of the day prior to the disruption contains a note by the court to the effect that:

> **"(As complainant is testifying the court notes that he is inviting men holding cameras into court)".**

3. The proceedings were stalled by the insistence by the complainant that the media had to be present during his testimony. After several interjections, the court ordered a short break after which the accused reiterated his demand for the media to be present while he testified. He also made a new demand that his matter be heard before a different court. At the end of the session, the court asserted its impartiality and observed that no prejudice could be suffered by the complainant if he testified in the absence of the media. But the court referred the recusal issue to the Chief Magistrate who correctly sent the matter back to the Hon. Resident Magistrate to deal with the question. In a ruling delivered on 5th June 2018 the court refused to recuse itself.

4. The Applicant's motion, dated 23rd July 2018 sought inter alia that, this court issues an order **"as to which court of competent jurisdiction will carry out the conduct of the Thika Cr. Case No. 5901 of 2017 and to transfer the file to another station."** On grounds, that the trial court was biased and that the Applicant was apprehensive that justice would not be done in the said trial court.

5. The motion is expressed to be brought under Section 81 of the Criminal Procedure Code and is supported by the Applicant's affidavit. Therein the Applicant raises a litany of accusations against the trial magistrate concerning *inter alia*, the adjournment allowed at the first hearing, alleged private meeting between the accused and the trial magistrate on 5.12.17, the alleged order on 14/5/18 to exclude the media from the trial showing open bias and the court's refusal to disqualify itself.

6. The Director of Public Prosecution (DPP) has opposed the motion on grounds, among others, that the application does not pass the test laid out in **Kinyatti v R (1984) e KLR** and is without merit. During oral canvassing of the motion the Applicant reiterated the contents of his affidavit while the DPP argued that the Applicant has failed to demonstrate the likelihood of a failure of justice if the order for transfer is not granted.

7. The court having considered the material canvassed in respect of the motion takes the following view of the matter. This court's power to transfer a criminal matter from one court to another is found in Section 81 of the Criminal procedure Code which provides:

> **"(1) Whenever it is made to appear to the High Court—**
>
> **(a) that a fair and impartial trial cannot be had in any criminal court subordinate thereto; or**

(b) that some question of law of unusual difficulty is likely to arise; or

(c) that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence; or

(d) that an order under this section will tend to the general convenience of the parties or witnesses; or

(e) that such an order is expedient for the ends of justice or is required by any provision of this Code, it may order —

(i) that an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;

(ii) that a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction;

(iii) that an accused person be committed for trial to itself".

(2) The High Court may act on the report of the lower court, or on the application of a party interested, or on its own initiative.

(3) ...

8. The Applicant's motion falls under Section 81(1) a & e as Subsection 1(c) though invoked has no relevance to this case, relating as it does to the likelihood of a visit of a scene, which is not among the matters raised in the motion. The Applicant has relied on an authority namely, **R v Mwalulu (erroneously referred to as Mwalalu) [2005] e KLR.** Wherein, the Court of Appeal in restating the applicable principles, stated that it is necessary in dealing with an application of this nature to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the mind of the public a reasonable doubt about the fairness and administration of justice, the test itself being objective and the facts constituting bias must be specifically stated and established.

9. The Court further emphasized that the court ought not to go into the question whether the court against which an order is sought is or will actually be biased. The test is whether there is reasonable apprehension in the Applicant's mind that a fair and impartial trial cannot be had before the said court based on the established facts. See **Patrick Ndegwa Warungu v R Milimani High Court Cr. Application No.440 of 2003 [2003] e KLR.** These are principles earlier stated by the Court of Appeal in **Kinyatti V R [1984] e KLR** where the Court having reviewed several leading authorities including the Tanzanian case of **R v Hashimu [1961] EA 656, Brown Shilenje v R HC Cr. Application No. 107 of 1976 (U R)** and quoting from **In the matter of an Application by M.S Patel [1913/1914] 5 KLR** stated that;

"It was held that the true test for making an order for transfer was not whether or not the magistrate was biased but whether a reasonable apprehension existed in the mind of the accused from incidents which had occurred that he may not have a fair and impartial trial. A transfer was ordered. Hamilton CJ quoting the Calcutta High Court decision in Dupeyron v Driver I LR XXIII Cal. 495 said at page 68:

"I am not here concerned with an issue as to whether the magistrate was in fact likely to be partial or impartial ... I am perfectly prepared to believe that the accused would have received a fair trial at his hands. But the test to be applied in such cases as this has been settled ... and I would refer particularly to the judgment of the Calcutta High Court in Dupeyron v Driver ... where the judges say:

"Where the apprehension in the mind of the accused that he may not have a fair and impartial trial is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the facts of the incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer". The patel case has withstood the test of time and in our view is still the law as the question of transfer of a criminal case by the accused ... if the accused shows his apprehension is reasonable then he has set out a clear case."

10. The Court further stated that the burden of proof on the part of the accused is on a balance of probabilities. With the foregoing principles in mind, the court has to consider whether the Applicant has discharged that burden.

11. Although the DPP and the accused in the lower court did not file affidavits in reply to the Applicant's Affidavit certain incidents asserted in the latter are clearly discredited by a cursory perusal of the court file. Regarding the allegation at paragraph 7 of the Supporting affidavit, the record shows that on 5.12.17 the matter was mentioned not before trial magistrate **Kyanya R.M,** but **Otieno Omondi SRM,** and that the first time **Kyanya R.M.** was seized of the matter was on 25.1.18.

12. Equally, with regard to the adjournment sought by and granted to the defence on 25.1.18 the prosecution did not object, and even the proceedings tendered by the Applicant do not contain any protests regarding delay in the address of the trial court by himself as purported in his affidavit. Besides the defence in seeking the adjournment stated that documentary evidence and witness statements had not been supplied. Regarding the Complaint made by the Applicant on that date to the effect that the Accused had harassed him, the court in granting adjournment directed him to make a report to the police. There is nothing untoward to be read into an adjournment, the first, which on the face of it was well supported. Besides, the trial magistrate, despite the presence of the prosecuting counsel on this occasion and subsequently, allowed the complainant to address the court.

13. Concerning the events of 14.5.18, all was proceeding well until the trial court noted that the complainant was inviting the some persons, presumably reporters, into court. The Applicant says the media were already in court. Whatever the case, the record does not show that the court ordered the media out, though the protestations by the complainant and address by the prosecution and direction of the court thereafter appear to suggest so. From his protestation, it seems that the Applicant had a hand in the media's presence in court. The trial was being held in open court, all persons including the media were at liberty to be present. That said, I am unable to see how the presence or absence of the media in an otherwise open trial could create a reasonable apprehension of bias on the part of the Applicant.

14. Again on this date, the trial court gave several opportunities to the Applicant to raise the issues he considered pertinent. The Applicant appears to have taken control of the proceedings from the prosecuting counsel responding in part, when the latter indicated that the matter be restricted to the charges that:

> **"I don't want to proceed without the media in court which is biased"** and later after a break was called, upon the prosecuting counsel indicating readiness to proceed the Applicant retorted:
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> **"I will only be ready to proceed in another court apart from this one. I also want the media present. This is a matter that has public interest. If the media is not in court, it will prejudice my case. The accused person has a bad history ... taken the law into her own hands".**

15. The Trial Magistrate may have erred by excluding the media personnel called in by the Applicant. Nevertheless, that of itself is not a matter to cause a reasonable apprehension of bias in this case. The media may play an important role in covering court proceedings but the media do not thereby become officers of the court. How can their presence determine the outcome of a case? Every reasonable person knows that cases are tried by presiding officers presumed to be competent. Besides, the DPP and not the complainant was in control of the criminal case and in my view the trial court's indulgence of the Applicant was totally gratuitous.

16. Equally the trial court erred by referring the question of disqualification raised before it to another court, and seemingly reiterating the exclusion of the media from the trial. Nonetheless such actions in my view cannot be the basis of a reasonable apprehension of bias on the part of the court. The trial court did not prevent the Applicant from completing his testimony at the hearing. Moreover the Applicants' sole grouse arose because some third parties (media) were excluded, to his chagrin.

17. In **Attorney General v Anyang Nyong'o (2007) 1EA 12** recently cited by the Court of Appeal in **Lubna Ali Sheikh Bajaber and Anor v Chief Magistrate's Court, Mombasa and 2 Others (2018) e KLR,** it was held that:

> ***"The objective test of 'reasonable apprehension of bias' is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that a Judge did not (will not) apply his mind to the case impartially["] Needless to say, a litigant who seeks [the] disqualification of a Judge comes to Court because of his own perception that there is appearance of bias on the part of the Judge. The Court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case..."***

18. It appears from the Applicant's conduct at the trial and before this court that he is labouring under illusion that the Accused's status as an advocate was likely to influence the trial and indeed any court in Thika Chief Magistrate's court. Such status, without more, cannot in this day and age, where numerous advocates are routinely tried for crimes in subordinate courts, lead to a reasonable apprehension that a fair and impartial trial may not be had.

19. Looking at the incidents of 25th January 2018 and 14th May 2018, it is my view that on the established facts no reasonable apprehension could be raised in the mind of the Applicant that he could not receive a fair and impartial trial. The authorities earlier referred to talk of an apprehension **"of a reasonable character" (see Kinyatti's case)** and not one more akin to paranoia and excessive suspicion as the Applicant herein appears to harbor. That said the trial court ought to always allow the media to cover the proceedings unless there are valid grounds for their exclusion.

20. The Applicant's motion is without merit and must be dismissed. The court directs that the lower court proceeds to list the case for mention on 28th February 2019 so that an early hearing date can be scheduled. It is so ordered.

DELIVERED AND SIGNED AT KIAMBU THIS 15TH DAY OF FEBRUARY 2019

C. MEOLI

JUDGE

In the presence of:-

The Applicant in person

Mr. Ongira for the D.P.P

2nd Respondent – absent

Court clerk - Kevin